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(1) Supreme Court, U.S.
FILED

No. 07- 071388 MAY 5 - 2008

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ROBIN K. NOLAN,

Petitioner,

v.

THE BOEING CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, (ADA) preempt Washington's law against discrimination under 42 U.S.C. § 12201(b) where Washington's law against discrimination provides lesser standards of protection for persons with disabilities by failing to provide for a mandatory interactive process between an employer and a disabled worker to effectuate a reasonable accommodation of the worker's disability?

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OPINION BELOW

The Washington Supreme Court's denial for petition for review is published at 178 P.3d 1032 (Wash. 2008). The opinion of the Washington Court of Appeals is unpublished, but it may be found at 2006 WL 3691663. The order of the Spokane County Superior Court is unpublished.

JURISDICTION

The Washington Supreme Court denied petitioner Nolan's petition for review on February 5, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provision

Article 6, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Statutory Provision

42 U.S.C. § 12201(b):

> This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this part.

STATEMENT OF THE CASE

Robin Nolan was hired by Boeing in July 1991 at its Spokane plant for performing generic services as a "Plastics Bench Mechanic B," and not for any specific task or work area. When Nolan was hired, she was not required to have a physical examination and was not required to meet physical requirements to work, as there were no specific physical requirements associated with any essential functions of her position. Her job title and description were general and flexible so that Boeing could assign and move employees like Nolan within that job title when and where needed. Boeing's Spokane employees could be assigned and transferred to any area or organization within Boeing.

In 1995-96, Boeing reconfigured its work processes in Spokane into "cells" and assigned Nolan to Cell A, and then, at her request, to Cell H. Boeing also changed her job title to Non-metallic Sub-Assembly Technician B (NMSATB). As before, there were no established physical requirements for a NMSATB in general, or for

work in any of the cells. This new job title changed nothing for Nolan since the position remained general and flexible so that Boeing could continue to move people around at its discretion.

Nolan had substantial training to perform her job and was qualified to work in any cell or NMSATB position. Nolan's job generally involved construction of air control system ducts, flight deck components, and floor panels, and manufacturing support. This work was divided up into individual cells and the work varied based upon part size and complexity. This work division into cells resulted in variations in job processes and job functions between the cells, as well as variations in physical demands on the employees.

During her tenure with the Company, Boeing assigned and reassigned Nolan to various cells, both at her request and by management discretion. Co-workers were similarly assigned and reassigned. There were approximately 20 cells and other NMSATB manufacturing support positions for which Nolan was qualified to work.

Nolan was injured on the job while assigned to a "subcell" in Cell H, on June 17, 1999. She filed a Washington industrial insurance (worker compensation) claim and within a week of her initial injury, her physician suspected she had sustained a fractured rib. Nonetheless, Boeing insisted she return to work immediately. Boeing put Nolan in a temporary, maximum six-month light "alternative work duty," as part of Boeing's industrial insurance program. The alternative work to which Nolan was assigned was sporadic and

did not consist of any of the essential functions of her NMSATB job. While on alternative work duty, Boeing advised Nolan that she could be laid off at the end of a six-month maximum period for such light duty.

About six weeks after her injury, diagnostic testing confirmed that Nolan had a rib fracture affected by a congenital bone disorder called fibrous dysplasia. Nolan notified Boeing of that disorder which affected the healing of the fracture and that she needed to be accommodated; she also advised Boeing that her physician, Dr. William Osebold, recommended that she have a physical capacities evaluation (PCE) and vocational counseling to help determine appropriate accommodation. However, Boeing never conducted a PCE, and no vocational counselor ever contacted Nolan to assist in determining any accommodation for her.

Nolan requested a new assignment in her NMSATB job and out of alternative work duty. Despite her request, Boeing left Nolan in the alternative work duty program and ignored her request. Boeing sent Nolan a letter on November 16, 1999 advising her that she had 45 days in which to address her medical restriction or she could be laid off. After this letter, Nolan feared termination. She again requested a return to her NMSATB job and suggested Cell A because she believed she could work there while healing. Again, Boeing never responded to her request.

On November 18, 1999, Dr. Osebold faxed Boeing his recommendations on the accommodation of Nolan's condition. On that same date, despite Dr. Osebold's communication, Boeing notified its industrial insurance

claims organization that Nolan would be terminated on January 3, 2000.

On November 30, 1999, 5 ½ months after her injury, Dr. Osebold placed permanent work restrictions on her activities because of the unknown amount of time it would take for her fractured rib to heal. Even after receiving this information, Boeing did nothing to initiate accommodation discussions with Nolan.

Nolan's limitations on her physical activities to allow recovery from her injuries did not prevent her from working at Boeing. Although she could not resume working in Cell H while recovering from her injuries, Dr. Osebold approved Cell H, with modifications once she healed. Nolan was not restricted from pushing, pulling and reaching, but was only 'limited' in those activities to prevent aggravation of her fractured rib. Boeing never discussed with Nolan how her limitations could be accommodated.

On December 3, Boeing told Nolan it did not want to accommodate her disability. After being refused accommodation, Nolan and a union steward met with Boeing to again request assignment to Cell A. Boeing did not tell Nolan it had earlier sent a Cell A job analysis to Nolan's physician and learned his opinion that she could work in Cell A. Boeing likewise did not disclose that it had already instructed its industrial insurance claims organization to find her employment *outside* Boeing.

On December 8, Nolan expressed concerns abut being re-injured if Boeing decided to place her back into

Cell H. Boeing did not respond on how it intended to accommodate her. Unknown to Nolan, Boeing had already decided by or before December 8 that she would not be accommodated by being assigned to Cell H.

Boeing never discussed a medical leave of absence as an accommodation option with Nolan, despite having a policy allowing leaves of up to two years. Since Nolan had suffered an industrial injury, she could have remained off work until she healed and was ready to return to work at Boeing, without being accommodated. At the time Nolan was terminated, there were over 290 available positions at Boeing Spokane alone that it could have considered as accommodation to Nolan.

After Boeing received Nolan's permanent work limitations from her physician, it made no arrangements to meet with Nolan to discuss her capabilities and limitations in order to accommodate her. Boeing arranged a Medical Placement Review Board (MPRB) meeting, without Nolan's knowledge, to discuss her termination.[1]

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1. Boeing is required to maintain an affirmative action program that includes a written policy on employment and retention of qualified individuals with disabilities. This policy was unknown to Nolan during her employment with Boeing. This written policy outlines the required steps of providing reasonable accommodation and mirrors the ADA. By Boeing's written policy, the MPRB "process" is the last resort after no accommodation of the disabled worker can be made on the job by reassignment to a vacant position, or by a downgrade of position. Boeing claimed its Spokane MPRB met to evaluate

(Cont'd)

On December 8, Nolan was advised she was being placed on an involuntary medical leave of absence because of her restrictions and that there was no place for her at Boeing at that time. Nolan disagreed and asked for a job analysis to review possible placement options as an accommodation. Her request was denied and there was no further discussion of any other possible accommodation, other than her ability to work in Cell H. As Nolan was being placed on an involuntary medical leave of absence, Boeing had already secretly decided to terminate her.

On December 14, Boeing held another meeting to discuss Nolan, again without her knowledge or input. Boeing did not want to accommodate Nolan's restriction caused by her fractured rib and the congenital disorder affecting her healing process.

On January 19, 2000, Boeing formally terminated Nolan, just six weeks after she was placed on medical leave of absence and while she was still healing from her job-related injuries, claiming she was "medically unable to perform work assignment." Before being

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(Cont'd)

Nolan. Nolan was not invited to attend this meeting and she was not made aware of it. In theory, the MPRB process matches medical restrictions to job analyses without regard to accommodation to perform the essential functions of the particular job.

Boeing's MPRB process relates only to employees that suffered work-related injuries and is focused on industrial insurance issues. By design, the MPRB does not include the worker input in any manner.

terminated, Nolan was not consulted concerning her capabilities or about any assessment of her abilities. Boeing never discussed with Nolan how her restrictions could be accommodated. Nolan was advised she was laid off because her permanent restriction could not be accommodated, and there were no cells or other positions where she could work with her restrictions.

Notwithstanding Boeing's claims, Nolan had other alternatives to accommodate her disability, including a two-year medical leave. Although she was formally terminated on January 19, 2000, Boeing had decided to fire her in early December of 1999. This was entirely consistent with Boeing's internal decision in late 1998 to reduce the number of injured workers at its Spokane facility: "We still have some bag[gage] to clean up from years past."

Following Nolan's termination, she made several attempts to return to Boeing employment under her collective bargaining agreement (CBA), which had a provision that allowed her to return to employment from a medical termination within five years. Within ten months after being terminated, Nolan had healed and her condition "fixed and stable" for industrial insurance purposes. Boeing refused to reinstate Nolan under the CBA.

On September 4, 2001, Nolan filed an action in the Spokane County Superior Court against Boeing claiming discrimination in violation of Wash. Rev. Code § 49.60 *et seq.* Boeing removed her case to the United States District Court for the Eastern District of

Washington, citing preemption under Section 301 of the Labor Management Relations Act. Boeing moved for summary judgment. In April 2002, the district court determined Nolan's state law discrimination claim was preempted by Section 301 and granted summary judgment to Boeing. Nolan appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the district court, ordering that the case be remanded to the state court. *Lumper v. Boeing Corp.*, 77 Fed. Appx. 946, 2003 WL 22301793 (9th Cir. 2003).

On remand, Boeing filed a motion for summary judgment and Nolan filed her own cross-motion for summary judgment. The trial court granted Boeing's motion and denied Nolan's motion. Nolan filed a motion for reconsideration, which was denied. She appealed to the Washington State Court of Appeals, Division III. That court consolidated her case with those of two other Boeing workers who had been the subject of discrimination, and affirmed the trial court's order in an unpublished opinion. The Washington Supreme Court denied review on February 5, 2008.

REASONS FOR GRANTING THE PETITION

A. Summary of Reasons

This Court has never specifically addressed the question of whether the ADA mandates an interactive process between an employer and a disabled worker on the accommodation of the disabled worker's disability. The majority of the Circuits mandate such a process in interpreting the ADA. This Court should accept review to definitely hold the ADA requires such an interactive process on accommodation of a disabled worker. U.S. S. Ct. Rule 10(c).

The decision of the Washington courts on reasonable accommodation of a disabled person should be reviewed by this Court because those courts held that Washington law on reasonable accommodation does not require a *mandatory* interactive process with the disabled person, a process mandated by the ADA. Insofar as Washington state law fails to incorporate this mandatory interactive process, it is preempted, 42 U.S.C. § 12201(b), and the ADA applies. Review is merited under U.S. S. Ct. Rule 10(c).

B. 42 U.S.C. § 12201(b) Preempts State Anti-Discrimination Laws Failing to Meet the Standards of the Americans with Disabilities Act

The provisions of 42 U.S.C. § 12201 are designed to establish a floor for the rights of disabled persons in the United States. As this Court observed in *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998), 42 U.S.C. § 12201(a) requires courts to construe the ADA to grant at least

as much protection to disabled persons as provided by the Rehabilitation Act, 29 U.S.C. § 790, *et seq.*, and the regulations implementing it.

Similarly, 42 U.S.C. § 12201(b) provides that state or local laws failing to provide "greater or equal protection for the rights of individuals with disabilities" must give way to the ADA. *See, e.g., American Ass'n of People with Disabilities v. Hood*, 278 F. Supp. 2d 1345 (M.D. Fla. 2003) (Florida law on access to polling places for disabled and elderly gives way to ADA despite compliance with other federal laws). This Court has never analyzed the precise scope of preemption under 42 U.S.C. § 12201(b).

To the extent that Washington's law banning discrimination against disabled persons fails to meet the ADA level of protection for such individuals, the ADA applies.

C. Federal Law Mandates an Interactive Process between Employers and Disabled Workers on Reasonable Accommodation

The ADA protects the disabled in the workplace by prohibiting discrimination against such persons. The ADA defines discrimination as

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . employee, unless such [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such [employer] . . .

42 U.S.C. § 12112(b)(5)(A).

To establish a prima facie case under the ADA, a plaintiff must demonstrate that (1) she is disabled within the meaning of the ADA; (2) she is qualified – with or without reasonable accommodation; and (3) she is the subject of discrimination because of her disability. 42 U.S.C. § 12112(b)(5)(A); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996); *Aldrich v. Boeing Co.*, 146 F.3d 1265, 1269 (10th Cir. 1998).

Where a disabled worker's disability can be reasonably accommodated, the ADA requires the employer to do so. The ADA gives general guidance on what is a reasonable accommodation, stating that reasonable accommodation "may include . . . job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, . . . and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B). Under 42 U.S.C. § 12112(b)(5)(A), the burden is on the employer to "demonstrate that the accommodation would impose an undue hardship on the operation of [its] business . . ."

In order to effectuate a reasonable accommodation of a disabled worker's disability, the ADA requires an interactive process on the worker's accommodation. The ADA's legislative history describes the reasonable accommodation interactive process as:

> A process in which barrier to a particular individual's equal opportunity are removed. The accommodation process focuses on the needs of a particular individual in relation to the problems in performance of a particular job because of a physical or mental impairment. A

> problem solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations that will result in meaningful opportunity for the individual with a disability.
>
> The interactive process is the primary means by which employees disabuse employers of their notions about the skills and abilities of employees with physical and mental impairments.

H.R. Rep. No. 101-485, pt. 2 at 65 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 347.

The ADA also authorizes the EEOC to issue regulations implementing the ADA. 42 U.S.C. § 12116. The EEOC regulations outline the nature of the interactive process:

> To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(o)(3). The EEOC's enforcement guidance also indicates an interactive process is mandatory. "The employer and the individual with a

disability should engage in an informal process to clarify what the individual needs and identify the appropriate accommodations." *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, EEOC Compliance Manual (CCH) § 902, No. 915.002 (March 1, 1999) at 5440.

The interactive process envisioned by the ADA directs that the parties actually communicate in good faith to ensure that the shared goal of identifying "an accommodation that allows the employee to perform the job effectively" is met. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1115 (9th Cir. 2000), *cert. granted on other grounds*, 532 U.S. 970 (2001), *vacated* 535 U.S. 391 (2002). *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999) ("The interactive process includes good-faith communications between the employer and employee."); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) ("A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith.").

An employer must "meet with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered employee's request, and offer and discuss available alternatives when the request is too burdensome." *Taylor*, 184 F.3d at 317.

The legislative history of the ADA indicates that once this process has been undertaken in earnest "the

expressed choice of the applicant shall be given primary consideration unless another effective accommodation exists that would provide a meaningful equal employment opportunity." S. Rep. No. 101-116 at 35 (1989); *see also*, H. R. Rep. No. 101-485 at 67 (1990). This choice, however, may be limited by nondiscriminatory provisions in collective bargaining agreements such as job assignments by seniority. *Barnett*, 535 U.S. at 406.

Under the ADA, the interactive process must take place *before* any argument can be made that the worker must demonstrate she can perform the essential functions of the job or that there is a precise accommodation available for the worker's disability. In *Barnett*, the Ninth Circuit stated as to the essential job functions:

> The interactive process requires that employers analyze job functions to establish the essential and nonessential job tasks. In order to identify the barriers to job performance, employers must consult and cooperate with disabled employees so that both parties discover the precise limitations and the types of accommodations which would be most effective. The evaluation of proposed accommodations requires further dialogue and an assessment of the effectiveness of each accommodation, in terms of enabling the employee to successfully perform the job. *See* 29 C.F.R. Pt. 1630, App. § 1630.9.

Barnett, 228 F.3d at 1115. Similarly, the Ninth Circuit rejected the employer's contention that the disabled worker bore the burden of proving the availability of a

reasonable accommodation before the mandatory interactive process occurred:

> U.S. Air argues that Barnett bears the burden of demonstrating the availability of a reasonable accommodation. To put the entire burden for finding a reasonable accommodation on the disabled employee or, effectively, to exempt the employer from the process of identifying reasonable accommodations, conflicts with the goals of the ADA. The interactive process is at the heart of the ADA's process and essential to accomplishing its goals. It is the primary vehicle for identifying and achieving effective adjustments which allow disabled employees to continue working without placing an "undue burden" on employers. Employees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. Putting the entire burden on the employee to identify a reasonable accommodation risks shutting out many workers simply because they do not have the superior knowledge of the workplace that the employer has.
>
> As the Third Circuit explained, since the regulations require the interactive process to identify appropriate accommodations, "it would make little sense to insist that the employee must have arrived at the end produce of the interactive process before the employer has a duty to participate in that process." *Taylor*, 184 F.3d at 316. At the same time, the employee

> holds essential information for the assessment of the type of reasonable accommodation which would be most effective. While employers have superior knowledge regarding the range of possible positions and can more easily perform analyses regarding the "essential functions" of each, employees generally know more about their own capabilities and limitations.

Id. at 1113.[2]

There is even some disagreement among the Circuits regarding the application of the interactive process. The Ninth Circuit in *Barnett* rejected the notion that a disabled worker bears the burden of proving certain pre-conditions to the mandatory interactive process on accommodation such as the ability to perform the "essential job functions" or the availability of a reasonable accommodation. Such matters are precisely the issues to be discussed by the disabled worker and the employer *in the interactive process.* A disabled worker cannot identify the "essential job functions" or possible "accommodations" until *after* that process, because, for example, an accommodation might include reassignment where the "essential job functions" are different, or medical leave. The Tenth Circuit in *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995), however, concluded that the ability of the disabled

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2. The Washington Court of Appeals below held that a disabled worker must prove that "a specific, reasonable accommodation was available to the employer at the time the employee reported the physical limitation. *Lumper*, 2006 WL 3691663 at *5. This is clearly contrary to the Ninth Circuit's holding in *Barnett.*

worker to perform the essential functions of the job was an element of a prima facie ADA cause of action. The Tenth Circuit later distinguished *White* in *Smith, supra,* holding that a person is qualified under ADA "even though they cannot perform their existing job no matter how much accommodation is extended." 180 F.3d at 1162. Reassignment is a viable option under the ADA. *Id.* at 1162-63.

The Washington Court of Appeals, however, held that "the question of reasonable accommodation does not arise until the [disabled workers] show that they can do the essential functions of the job." *Lumper*, 2006 WL 3691663 at *7. *See also*, *Davis*, 70 P.3d at 131-34. This holding is plainly contrary to *Smith* and cases cited therein.

This Court has never expressly held that the ADA mandates an interactive process on accommodation. There is a split of authority in the Circuits on this question. The Ninth Circuit sitting en banc in *Barnett* recognized that an interactive process of accommodation with a disabled worker is *mandatory*:

> Although an ADA plaintiff ultimately can prevail on a failure to accommodate claim only if he or she proves a reasonable accommodation would have been possible, the plaintiff does not have to provide evidence that the accommodation was feasible to overcome an employer's motion for summary judgment. The purpose of the interactive process is to identify and to develop a reasonable accommodation. If

the interactive process did not occur, it is difficult to tell whether accommodation would have been possible:

The interactive process is the key mechanism for facilitating the integration of disabled employees into the workplace. Employers who reject this core process must face liability when a reasonable accommodation would have been possible. Without the interactive process, many employees will be unable to identify effective reasonable accommodations. Without the possibility of liability for failure to engage in the interactive process, employers would have less incentive to engage in a cooperative dialogue and to explore fully the existence and feasibility of reasonable accommodations. The result would be less accommodation and more litigation, as lawsuits become the only alternative for disabled employees seeking accommodation. This is a long way from the framework of cooperative problem solving based on open and individualized exchange in the workplace that the ADA intended. Therefore, summary judgment is available only where there is no genuine dispute that the employer has engaged in the interactive process in good faith.

We hold that employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible. We further hold that an employer cannot prevail at the summary

> judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process.

Barnett, 222 F.3d at 1116. *See also Beck*, 75 F.3d at 1135; *Taylor v. Principal Fin. Group Inc.*, 93 F.3d 155, 165 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 633 (7th Cir. 1998); *Smith*, 180 F.3d at 1172; *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 315 (3d Cir. 1999); *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 952 (8th Cir. 1999).

However, other courts have held that the ADA and its regulations do not create liability for the employer for failing to involve the disabled worker in an interactive process on accommodation. *See Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (holding that the plaintiff has the burden of showing available accommodations and that the employer cannot be found liable "merely for failing to engage in the [interactive] process itself"); *White*, 45 F.3d at 363 (noting that the regulations only recommend that an interactive process occur, and only after the employee shows that reasonable accommodation is available). *See also Staub v. Boeing Co.*, 919 F. Supp. 366, 370 (W.D. Wash. 1996) (holding that the regulations only recommended an interactive process).

As a federal contractor, Boeing had a policy for the handling of disabilities of its workers.[3] That policy,

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3. The Department of Labor—Office of Federal Contractor's Compliance Program oversees that Boeing's Policy is consistent with the Americans With Disabilities Act under 29 U.S.C. § 793.

"Employment and Retention of Qualified Individuals with Disabilities," details the affirmative steps Boeing will follow to ensure compliance with federal, state, and local laws against disability discrimination. Boeing's policy clearly states that the accommodation process must include involvement of the person needing accommodation. Boeing was required by 29 U.S.C. § 793 to follow the detailed steps of its own policy, including the generation of requisite documents indicating its accommodation efforts on behalf of Nolan. The only documentation prepared by Boeing with respect to Nolan, related solely to its industrial insurance claim handling.

In this case, Boeing's policy violated the ADA in its application. The ADA requires an *interactive* process. Boeing's MPRB was far from that, given the fact that Nolan did not even participate actively in it. The ADA and Boeing policy require Boeing to engage in a good faith interactive process, which would have identified Nolan's precise limitations, the essential functions of any job in question, and the barriers to Nolan performing the essential functions of such jobs. Only from this interactive process could Nolan and Boeing identify a reasonable accommodation, which would include any suggestion of modification if needed to allow her to perform the essential functions of the job in question. Boeing violated its own policy.

This Court should grant review to resolve the split in the Circuits as to the necessity of a mandatory interactive process between an employer and disabled worker on the accommodation of the worker's disability, and the timing of such a process, and to confirm that

the disabled worker states a cause of action under the ADA for the employer's failure to reasonably accommodate the disability, and the timing of such a process, by not having an interactive process or participating in it in bad faith.

D. Washington Law on Reasonable Accommodation of Disabled Persons Does Not Include a Mandatory Interactive Process with the Disabled Person

Like the ADA, Washington law prohibits discrimination based on disability. The Washington Law Against Discrimination (WLAD), Wash. Rev. Code § 49.60 *et seq.* makes it unlawful for an employer to discriminate against an employee due to "the presence of a sensory, mental, or physical disability." Wash. Rev. Code § 49.60.180(2). Under Washington law, "An employer, . . . must provide reasonable accommodation unless it can prove that the accommodation would impose an undue hardship." Wash. Admin. Code § 162-22-075. The law is equally clear that employers "have an affirmative obligation to reasonably accommodate the disability of an employee unless the employer can demonstrate that the accommodation would cause undue hardship on the employer's business." *Martini v. Boeing Co.*, 945 P.2d 248, 253-54 (Wash. App. 1997), *aff'd*, 971 P.2d 45 (Wash. 1999) (citing *Doe v. Boeing Co.*, 846 P.2d 531 (Wash. 1993) and Wash. Admin. Code § 162-22-080). "An employer's failure to reasonably accommodate the sensory, mental, or physical limitations of a disabled employee constitutes discrimination unless the employer can demonstrate that such an accommodation would result in an undue hardship to

the employer's business." *Pulcino v. Fed. Express Corp.*, 9 P.3d 787, 793 (Wash. 2000). There is no such undue hardship claim here.

Under Washington law, reasonable accommodation is defined as "measures that enable the proper performance of the particular job held or desired." Wash. Admin. Code § 162-22-065(1)(b). Whether an accommodation is "reasonable" typically involves factual inquiries. *Pulcino*, 9 P.3d at 795; *Phillips v. City of Seattle*, 766 P.2d 1099, 1103 (Wash. 1989). If an employee can perform the essential functions of the job with accommodation, the employer *must* make the accommodation that will enable the worker to do so. *See Davis v. Microsoft Corp.*, 70 P.3d 126, 131 (Wash. 2003).

The decision of the Washington Court of Appeals, and the Washington Supreme Court in denying review, evidence the fact that Washington law on the requirement of a mandatory interactive process on accommodation is often contradictory. The Washington Supreme Court has held that notice of an employee's disability "triggers the employer's burden to take 'positive steps' to accommodate the employee's limitations." *Goodman v. Boeing Co.*, 899 P.2d 1265, 1269-70 (Wash. 1995). "Reasonable accommodation . . . envisions an exchange between employer and employee where each seeks and shares information . . ." *Id. See also Davis*, 70 P.3d at 134. Notwithstanding the *Goodman* court's understanding regarding a mandatory interactive process to accommodate a disabled worker like Nolan, the Washington Court of Appeals below concluded that under Washington law, an interactive process is "highly recommended," but

"not an absolute requirement." 2006 WL 3961663 at *5, citing *MacSuga v. County of Spokane*, 983 P.2d 1167 (Wash. App. 1999).

The Washington Court of Appeals also concluded under Washington law that a disabled worker must prove that she can perform the essential functions of the job *before* the issue of reasonable accommodation arises. 2006 WL 3691663 at *7. This is contrary to the ADA, for the reasons set forth *supra*.

The inconsistency in Washington law on the question of a mandatory interactive process on the accommodation of a worker's disability and whether a disabled worker must prove she can perform all of the essential job functions before the interactive process occurs, mirrors the split in the Circuits on the necessity of such a process under the ADA as well as its timing. This Court should grant review and confirm that to the extent Washington law does not afford Robin Nolan a mandatory interactive process on the accommodation of her disability in the workplace, Washington law must give way to the ADA under 42 U.S.C. § 12201(b).

CONCLUSION

The decision of the Washington courts here strike at the heart of a central feature of the ADA – employers must undertake a reasonable accommodation of a disabled worker's disability by engaging in a mandatory interactive process with the worker on accommodation of the worker's disability. This process is designed to have employers and disabled workers work together to identify the essential functions of the worker's job, the worker's disability, and the available options to accommodate the worker to effectuate the goal of maintaining the disabled worker in gainful employment.

To the extent Washington state anti-discrimination law fails to provide for such a mandatory interactive process on reasonable accommodation of a worker's disability, or Washington law conditions a disabled worker's participation in such a mandatory process by requiring her to prove she can perform the allegedly "essential functions" of the job, it provides lesser protection to disabled persons and is preempted under 42 U.S.C. § 12201(b) in favor of the better protection of disabled persons found in the ADA.

This Court should accept review.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF THE STATE OF WASHINGTON FILED DECEMBER 14, 2006

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

No. 23760-5-III
(consolidated with
No. 23761-3-III)

ARLENE H. LUMPER; DENNIS L. LANGAN,

Appellants,

v.

THE BOEING CORPORATION,

Respondent.

No. 24113-1-III

Division Three

ROBIN K. NOLAN,

Appellant,

v

THE BOEING CORPORATION,

Respondent.

Appendix A

UNPUBLISHED OPINION

SWEENEY, C.J.—An employee must first show that he or she can perform the essential functions of a job to prevail on most employment-discrimination-related causes of action. Here, the employees failed to show that they could perform the essential functions of their job. We then affirm the trial court's summary dismissal of their various claims for unlawful discharge.

FACTS

We have consolidated these cases for this appeal. *See* RAP 3.3(b). The following facts are common to all three claims.

The Boeing Corporation implemented a "cellular" production system in 1996. It divided the workforce into units called cells. The cells perform the same sorts of tasks. But some are more difficult than others because of the weight, size, and shape of the parts manufactured by that cell. The cells are denominated A through I. Cell H involves the largest parts and the most physically demanding labor.

All manufacturing employees, including Dennis L. Langan, Arlene H. Lumper, and Robin K. Nolan, had the same generic job classification called Non-Metallic Sub-Assembly Technician B. Boeing's approach facilitated a flexible production scheme. The technicians rotated regularly within cells and also between cells, according to production demands. Accordingly, the

technicians' job description encompassed all of the various manufacturing tasks. Boeing expected that every technician would perform every task.

Robin K. Nolan: Ms. Nolan started at Boeing in 1991 and became a Non-Metallic Sub-Assembly Technician B following the adoption of the new manufacturing scheme in 1996. Ms. Nolan thought the cell system violated state safety and disability accommodation laws. She expressed her concerns to management. She wrote to Boeing's chief executive officer and recommended that regular rotation be incorporated into the cell system to avoid ergonomic repetitive motion injuries. In response, a Boeing attorney and an equal employment opportunity officer visited the Spokane plant. Boeing thereafter incorporated rotation into the cellular system.

At Ms. Nolan's request, Boeing assigned her to the most strenuous cell, Cell H. The work proved too strenuous. Ms. Nolan asked to be reassigned because she was afraid of hurting herself. Ms. Nolan says that Boeing moved two coworkers who requested reassignment at the same time and for the same reasons, but Boeing told her to get a medical restriction. Ms. Nolan was also told she could not move because of her "reputation." She complained to the union that Boeing was retaliating against her and trying to force her to quit.

Ms. Nolan injured her ribs at work in June 1999. The emergency room doctors imposed temporary

restrictions. Her own doctor added more restrictions: she could do no lifting or repetitive use of her right arm. Ms. Nolan's doctor added more temporary restrictions over the next few months.

Boeing assigned Ms. Nolan to general office work as a temporary accommodation. She was not happy about this. She thought she should either be assessed for immediate return to a production cell or allowed to stay home and receive worker's compensation.

Then, an MRI[1] scan showed a congenital bone condition, fibrous dysplasia, which predisposes the sufferer to fractures. Boeing asked Ms. Nolan's doctor to evaluate the tasks in Cells A and H. The doctor said she could not work in either cell without exacerbating her condition. She would likely be hurt if she continued in manufacturing. A scheduled physical capacities evaluation was then cancelled.

On October 26, 1999, again at her own request, Ms. Nolan did some light duty cutting and trimming in Cell H. But eight hours of this was enough to aggravate her symptoms. Her doctor made her physical restrictions permanent.

Boeing informed Ms. Nolan that her six-months' eligibility for light duty was running out, so she asked to return to work. Boeing conducted a return-to-work intake interview. Ms. Nolan said she could not do some

1. Magnetic resonance imaging.

trim tasks, or use certain tools, especially the hand router. She could not suggest any accommodation that would allow her to perform any of the requirements of the job. So Boeing placed Ms. Nolan on medical leave in December 1999 and terminated her in January 2000.

Arlene H. Lumper: Boeing hired Ms. Lumper in September 1990. Six months after being hired, she was diagnosed with job-related carpal tunnel syndrome. Over the next three years she had multiple carpal tunnel surgeries on both hands. But she continued to perform without accommodation, in spite of hand pain. Her doctor imposed work restrictions, but Ms. Lumper did not tell Boeing about the restrictions at that time. Then she tore a muscle in 1994, and was off work until the spring of 1995.

Boeing assigned Ms. Lumper to Cell F. She worked there without accommodation. She was then assigned to Cell H delivering materials. She then produced the doctor's restriction order and asked to return to Cell F. The restrictions applied equally to Cell F, so Boeing denied her request for transfer.

Five months into her Cell H assignment, Ms. Lumper had non-work-related surgery. In November 1997, and again in March 1998, Ms. Lumper's doctor okayed her for all tasks in Cells C, E, and G, with a preference for C. Instead, in May 1998, Ms. Lumper was assigned to do only lay-up and bagging in Cell F. The repetitive motion caused her wrists to flare up. She asked either to rotate in Cell F or to move to Cells C, E,

or G to relieve the repetitive motion. Boeing denied this request. Ms. Lumper was unable to work at all until March 22, 1999. Ms. Lumper's doctor then made her 1991 "temporary" restrictions permanent.

Again, Boeing conducted a return-to-work intake interview. On March 31, 1999, Ms. Lumper reported that she "cannot do any part" of the job of non-metallic sub-assembly technician because she could not use her hands, even to open the slider door at her home. The only accommodation she could think of was to do only lay-up and bagging. But this was the very job she had asked to be relieved from when the repetitive motions caused her wrists to flare up.

Boeing terminated Ms. Lumper under "Code 16"—medically unable to perform work assignment—in April 1999.

Dennis L. Langan: Boeing hired Mr. Langan in 1991. Five months later, he injured his shoulder in a slip and fall at work. Over the next four years, his doctor imposed intermittent temporary restrictions. Boeing would then assign Mr. Langan to light duty. After he became a union representative in 1992, his relationship with Boeing became adversarial. Mr. Langan suggested numerous ergonomic and safety improvements that were not well received.

Mr. Langan's medical condition continued to deteriorate. In 1998, Mr. Langan's doctor arranged a physical capacity evaluation. The results showed that

Mr. Langan could not return to his former employment. His doctor agreed and made Mr. Langan's medical restrictions permanent. Boeing assigned him to light duty.

Mr. Langan had shoulder surgery for degenerative joint disease in August 1998. He had excellent range of motion under anesthesia, and the surgeons released him for work. He returned to work in October 1998. And Boeing placed him in a six-month alternative work program. He complained that his doctor had not approved this work. So Boeing assigned him to making labels and, later, to a training center for six months.

An ultrasound showed more shoulder problems on January 29, 1999. A physical capacities evaluation on April 9, 1999, showed he could do eight hours per day of light work with no reaching above the shoulder.

In April 1999, with 30 days alternative assignment eligibility remaining, Boeing told Mr. Langan either to address his restrictions or face Code 16 medical termination. A return-to-work intake interview took place in May 1999. Mr. Langan said there was no part of his job he could do and he could think of no accommodation that would help him do his job. Boeing placed him on medical leave and medically terminated him in December 1999.

All three employees sued for disability discrimination. Boeing moved for summary judgment. The employees also moved for summary judgment. The

trial court concluded that none of the material facts were disputed and granted Boeing's motions.

DISCUSSION

STANDARD OF REVIEW

Here, we review a trial court's summary dismissal of these claims. We stand, then, in the shoes of the trial court and review the pleadings, depositions, and affidavits in the light most favorable to the nonmoving party. *Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 144, 94 P.3d 930 (2004). Summary judgment is, of course, appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *McClarty v. Totem Elec.*, 157 Wash.2d 214, 220, 137 P.3d 844 (2006). The claims here are employment discrimination cases. So we apply the burdenshifting scheme originally set forth in *McDonnell Douglas Corp. v. Green.*[2] *Dean v. Mun. of Metro. Seattle*, 104 Wash.2d 627, 637, 708 P.2d 393 (1985).

WASHINGTON LAW AGAINST DISCRIMINATION

Washington's law against discrimination (WLAD) prohibits employers from discharging people based on a sensory, mental, or physical disability, or discriminating against disabled people in conditions of employment. RCW 49.60.010, .180; *Riehl*, 152 Wash.2d at 144-45, 94

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2. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

P.3d 930. WLAD disability discrimination claims are of two types-failure to accommodate a disability and disparate treatment because of a disability. *Roeber v. Dowty Aerospace Yakima*, 116 Wash.App. 127, 135, 64 P.3d 691 (2003).

A prima facie case of failure to accommodate has four elements. The employee must show that (1) he or she had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job; (2) he or she was, nonetheless, qualified to do the essential functions of the job; (3) he or she gave the employer notice of the abnormality; and (4) the employer failed to affirmatively adopt available measures to accommodate the abnormality. *Id.* at 138-39, 64 P.3d 691. The disputed elements here are whether the employees showed that they could perform the essential functions and whether Boeing provided reasonable accommodation.

We liberally construe the WLAD to achieve its purpose to eliminate and prevent discrimination. RCW 49.60.020; *Griffith v. Boise Cascade, Inc.*, 111 Wash.App. 436, 442, 45 P.3d 589 (2002).[3] We apply the burden-shifting scheme set out in *McDonnell Douglas Corp. v. Green*, when adjudicating accommodation claims. *Hill*

3. Our state Supreme Court recently changed the definition of "disability" for WLAD claims and adopted the definition of disability set forth in the federal Americans with Disabilities Act of 1990, 42 U.S.C. § 12101. *McClarty*, 157 Wash.2d at 228, 137 P.3d 844. But the new definition does not affect our analysis here.

v. BCTI Income Fund-I, 144 Wash.2d 172, 180, 23 P.3d 440 (2001). First, the employee must make out a prima facie case. Then the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the challenged act. The burden then shifts back to the worker to refute the employer's claimed reasons. *Dean,* 104 Wash.2d at 637, 708 P.2d 393. But both accommodation and discharge claims require a prima facie showing that the worker can perform the essential functions of the job. *Hill,* 144 Wash.2d at 181, 23 P.3d 440; *Roeber,* 116 Wash.App. at 134-35, 64 P.3d 691.

WASHINGTON LAW APPLIES

The workers first argue that the prima facie case required by Washington law does not apply to federal contractors such as Boeing. They contend they made out a prima facie case under federal law by showing that Boeing (1) did not follow its own federally mandated policy manual and (2) did not follow a four-step interactive process used by federal courts applying federal law; that is identify (a) the employee's limitations, (b) the essential job functions, (c) any barriers to performing any essential function, and (d) reasonable accommodations. They rely on *Morton v. United Parcel Serv., Inc.,* 272 F.3d 1249 (9th Cir.2001), and *Barnett v. U.S. Air, Inc.,* 228 F.3d 1105 (9th Cir.2000). The workers also rely on *Morton* and *Barnett* for the proposition that they did not have the burden at summary judgment to show that they proposed a reasonable and available accommodation. Rather, they contend, upon notice of a disability, it was up to Boeing

to find an accommodation or to show that none is available, again citing *Morton* and *Barnett.*[4]

They argue that Boeing must either show that it offered a reasonable accommodation or assert an affirmative defense such as hardship. The employees say Boeing refused even to consider modifying the cellular rotation system to provide permanent accommodation. Boeing provided only temporary light duty and involuntary leave. They argue that they were discharged because their medical conditions persisted. And, they contend, this is not reasonable accommodation. They assert that accommodation in the form of reassignment to nonproduction cells was available.

Boeing responds that Washington law not federal law applies. We agree. *Roeber,* 116 Wash.App. at 135, 64 P.3d 691. And in Washington, the employee must start the interactive accommodation process by notifying the employer of the physical limitations and suggesting an available reasonable accommodation. *Pulcino v. Fed. Express Corp.,* 141 Wash.2d 629, 643, 9 P.3d 787 (2000) (citing *MacSuga v. County of Spokane,* 97 Wash.App. 435, 442, 983 P.2d 1167 (1999) (citing *Barnett v. U.S. Air, Inc.,* 157 F.3d 744, 749 (9th Cir.1998))).

The workers also contend that state courts must comply with federal interpretations of the Americans with Disabilities Act of 1990, 42 U.S.C. § § 12101-12209,

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4. *Morton,* 272 F.3d at 1256; *Barnett,* 228 F.3d at 1112.

unless their own state statute provides equal or greater protection. But they cite to no authority for this. And we find none. Federal employment law is one source of guidance in adjudicating WLAD cases, but it is not binding on Washington courts. *Hill*, 144 Wash.2d at 180, 23 P.3d 440. We may adopt or reject federal theories to accomplish the goals of our own statutes. *Id.* (quoting *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash.2d 355, 361-62, 753 P.2d 517 (1988)). Our own Supreme Court is the ultimate authority on Washington discrimination statutes. *McClarty*, 157 Wash.2d at 228, 137 P.3d 844.

Moreover, the cases cited by the workers for their "interactive process" arguments do not conflict with Washington law. *MacSuga*, 97 Wash.App. at 444, 983 P.2d 1167. Workers suing in federal court, like plaintiffs suing here in Washington, must show that a specific, reasonable accommodation was available to the employer at the time the employee reported the physical limitation. *Pulcino*, 141 Wash.2d at 643, 9 P.3d 787 (citing *MacSuga*, 97 Wash.App. at 442, 983 P.2d 1167 (citing *Barnett*, 157 F.3d at 749)). A WLAD plaintiff must make an initial showing that he or she requested a specific accommodation that was both reasonable and available. *Pulcino*, 141 Wash.2d at 643, 9 P.3d 787; *MacSuga*, 97 Wash.App. at 442, 983 P.2d 1167. And this must happen at the summary judgment stage. *Dean*, 104 Wash.2d at 637, 708 P.2d 393. Discussions between employer and employee are highly recommended, but are not an absolute requirement. *MacSuga*, 97 Wash.App. at 443, 983 P.2d 1167 (quoting *White v. York Int'l Corp.*, 45 F.3d 357, 363 (10th Cir.1995)).

Appendix A

ESSENTIAL FUNCTIONS

Boeing contends that these workers failed to show that they could do the essential job functions. What the term "essential functions" means is a question of law. *Davis v. Microsoft Corp.*, 149 Wash.2d 521, 533, 70 P.3d 126 (2003). What the essential functions of a particular job are is a question of fact. *Microsoft*, 149 Wash.2d at 533, 70 P.3d 126.

Boeing contends the bottom line here is that these workers did not show they could perform the essential functions of their job, and for good reason: they could not perform the essential functions of their job. Boeing argues that the essence of the job here is manual labor. And lifting, reaching, grasping, pushing, pulling, twisting, and using vibrating tools are essential functions. The only available accommodation, Boeing suggests, is temporary reassignment to light duty until the workers recover from their injuries. And this, Boeing says, it provided. But, when as here, the physical capacities restrictions become permanent, the restrictions simply cannot be accommodated in a cellular production facility. The employees were, then, unable to perform the essential functions and permanent accommodation was not possible. The bottom line of Boeing's argument is that these workers failed to make out a case that they could perform the essential functions of a cellular production job, with or without accommodation.

Appendix A

The workers contend that Boeing failed to define the essential functions of a technician. The record suggests otherwise. Attached to Ms. Nolan's declaration as Exhibit 2 are lists of the essential functions of every job in the production cells at issue here. For example, the essential functions of the job of lay-up/bagging are: place item on table, apply two coatings of some sort, trim the excess, smooth by hand, apply two or three wrappings, and bag. The physical capacities involved and their required frequencies are also listed. Rotation between jobs within the cell occurs approximately weekly. Nolan Clerk's Papers (Court of Appeals No. 24113-1-III) at 494-549.

The workers now say they could perform enough of the essential job functions to do many of the technician jobs that were available. Again, the record suggests otherwise. Both Mr. Langan and Ms. Lumper told Boeing shortly before their termination that they could not perform any aspect of the job. Ms. Nolan had a chronic congenital bone condition that made her highly susceptible to bone fractures. Her physician said she could not do any of the work without risk of serious injury. The workers could perform none of the production tasks, by their own evidence. And neither they nor Boeing were able to suggest any way to modify the job to enable them to continue in these production cells.

There is, then, no prima facie showing on this record that these workers could perform the essential functions of their job. And the workers do not dispute that the cellular production system itself is essential.

As an alternative to showing they could do the essential functions, the employees could have established a prima facie case by showing that they were qualified to fill vacant positions and either (a) Boeing did not affirmatively help them find openings or (b) they applied and were denied in favor of a non-disabled applicant. *See Dean*, 104 Wash.2d at 639, 708 P.2d 393.

Boeing says all its supervisors were asked to report any openings, and no suitable opening was available. The employees challenge this assertion and contend that there were jobs at Boeing that they could do. But they did not produce specific evidence of any particular vacant positions, claim that they applied for them, or claim they were denied an available position because of their disability.

Again, this raises no genuine issue of material fact because, on this record, the workers have not made a showing that they can perform the essential functions of any of these jobs.

REASONABLE ACCOMMODATION

Employers must reasonably accommodate a disabled employee who is able to perform the essential functions of the job, unless to do so would impose undue hardship on the employer. *Riehl*, 152 Wash.2d at 145, 94 P.3d 930; *Becker v. Cashman*, 128 Wash.App. 79, 84, 114 P.3d 1210 (2005).

Appendix A

What constitutes reasonable accommodation is a question of fact and is determined on a case-by-case basis. *Dedman v. Pers. Appeals Bd.*, 98 Wash.App. 471, 482, 989 P.2d 1214 (1999); *Pulcino*, 141 Wash.2d at 644, 9 P.3d 787; *Riehl*, 152 Wash.2d at 146, 94 P.3d 930. Boeing provides injured technicians with up to six months light duty. After that, if they still cannot work, they may be discharged as medically unable to perform their work assignment.

The employees contend this is not reasonable. WLAD requires employers to accommodate both temporary and permanent disabilities. *Pulcino*, 141 Wash.2d at 643, 9 P.3d 787. And employers cannot discharge their affirmative obligation to reasonably accommodate disabled employees merely by providing an inflexible period of alternative assignment and "thereafter doing nothing." *Erwin v. Roundup Corp.*, 110 Wash.App. 308, 316, 40 P.3d 675 (2002).

Boeing responds that the question of reasonable accommodation does not arise until the employees show that they can do the essential functions of the job.

Boeing is correct. The employer must accommodate only employees who are able to perform the essential functions of the job. *Microsoft*, 149 Wash.2d at 534, 70 P.3d 126; *Hill*, 144 Wash.2d at 192-93, 23 P.3d 440. Employers are not required to eliminate or reassign essential job functions in order to accommodate disabled workers. *MacSuga*, 97 Wash.App. at 442, 983 P.2d 1167. Because the employees failed to show they could

perform the essential functions, Boeing was entitled to judgment as a matter of law on that claim. *See, e.g., Microsoft,* 149 Wash.2d at 534, 70 P.3d 126.

UNLAWFUL DISCHARGE

To establish a claim of discharge based on disparate treatment under WLAD, the employee must show that she was discharged because of a disability. RCW 49.60.180(2); *Roeber,* 116 Wash.App. at 135, 64 P.3d 691. We again apply the *McDonnell Douglas* burden-shifting scheme. *Kastanis v. Educ. Employees Credit Union,* 122 Wn.2d 483, 490, 859 P.2d 26, 865 P.2d 507 (1993). The employee must show that he or she "(1) is in a protected class (disabled), (2) was discharged, (3) was doing satisfactory work, and (4) was replaced by someone not in the protected class." *Roeber,* 116 Wash.App. at 135, 64 P.3d 691.

These elements should not be confused or conflated with an accommodation claim. *McClarty,* 157 Wash.2d at 227-28, 137 P.3d 844. The mere presence of a disability must be the reason they were discharged. *Id.* at 222, 137 P.3d 844. But these workers essentially argue that they were wrongfully discharged because Boeing refused to accommodate their disabilities.

The *prima facie* case here thus also fails. The disabled employees were certainly in a protected class. And they were discharged. But, again, they did not show they were doing satisfactory work. To the contrary, they offered evidence in support of their accommodation

claims that entirely defeats the requirements of a disparate treatment prima facie case. The workers' own evidence showed they could not do the work under any circumstances. Nor did the employees allege or show that they were replaced by able-bodied people.

The trial court correctly concluded that the discharge claims failed as a matter of law. Moreover, Boeing later rehired Mr. Langan. The trial court concluded that this was at least clear circumstantial evidence that the disability was not the reason for the earlier discharge. We agree. Proof of the prima facie case creates an inference of discrimination. But Boeing's rehiring of Mr. Langan refutes any inference of discrimination and defeats the disparate treatment claim as a matter of law. *See Riehl,* 152 Wash.2d at 149, 94 P.3d 930. Mr. Langan would, then, have had to show the rehire was pretextual. But an argument or assertion can be pretextual. Actually rehiring someone is real.

Ms. Lumper contends that Boeing fired her simply for requesting accommodation. But she also says she did not need accommodation because she could perform the essential functions of her job without accommodation. She contends she was fired because of her previous history of needing accommodation. These arguments are contradictory, and we reject them.

RETALIATION

To prove retaliation, the workers must show they engaged in a protected activity, suffered an adverse

employment action, and that the protected activity was a substantial factor in their discharge. *Schonauer v. DCR Entm't, Inc.*, 79 Wash.App. 808, 827, 905 P.2d 392 (1995). If the employer can overcome the prima facie case by showing a reasonable basis for the disparate treatment, then the burden shifts back to the plaintiff to demonstrate that the presumptively valid reasons were nonetheless a pretextual and discriminatory action. *Curtis v. Clark*, 29 Wash.App. 967, 969, 632 P.2d 58 (1981).

Ms. Nolan contends Boeing retaliated against her for her complaints about working conditions. But Boeing investigated her letter requesting rotation and then adopted her suggestions. And, given Ms. Nolan's physical incapacity and the medical restrictions that limited her from performing any aspect of the work, no reasonable jury could find that she was fired for complaining.

Mr. Langan also implies he was really fired for his union activism. But Boeing rehired Mr. Langan after the termination at issue here. As with the disparate treatment claim, this defeats a prima facie case of retaliation. Boeing provided the appropriate remedy—reinstatement. *See Wheeler v. Catholic Archdiocese of Seattle*, 65 Wash.App. 552, 572, 829 P.2d 196 (1992), *rev'd on other grounds*, 124 Wash.2d 634, 880 P.2d 29 (1994). The court was correct. The employees failed to show that factors other than their inability to work played any substantial part in the decision to terminate them.

Appendix A

HARASSMENT

Ms. Lumper next argues that Boeing supervisors instituted a campaign of harassment against her because she asked for accommodation after surgery on her hands. The quality of her work was criticized in front of others. And she was told her peers would inspect her work. She complains she was singled out to keep a log of her work. She believes the sole purpose for all this was to humiliate her.

To establish a claim of hostile work environment disparate treatment, a plaintiff must prove she was subjected to unwelcome harassment because she was a member of a protected class, that the harassment affected the terms and conditions of her employment, and it was imputable to her employer. *Domingo v. Boeing Employees' Credit Union*, 124 Wash.App. 71, 84, 98 P.3d 1222 (2004). The harassment must be sufficiently pervasive so as to alter her employment conditions. *Washington v. Boeing Co.*, 105 Wash.App. 1, 10, 19 P.3d 1041 (2000). "It is not sufficient that the conduct is merely offensive." *Adams v. Able Bldg. Supply, Inc.*, 114 Wash.App. 291, 296, 57 P.3d 280 (2002). Casual, isolated, or trivial incidents do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law. *Payne v. Children's Home Soc'y of Wash., Inc.*, 77 Wash.App. 507, 515, 892 P.2d 1102 (1995) (quoting *Glasgow v. Georgia-Pac.*, 103 Wash.2d 401, 406, 693 P.2d 708 (1985)).

Appendix A

We agree with Boeing that, even accepting Ms. Lumper's allegations as true, she failed to show that the incidents were severe and pervasive or that they had anything to do with her disability. Ms. Lumper concedes that the work of other injured workers was not subject to heightened scrutiny and that those workers were not deliberately humiliated.

Here, given our disposition on the employment discrimination claims, it is impossible to conclude that triable issues of fact remain on either the degree of harassment or its connection to the workers' employment conditions. Ultimately, these workers lost their jobs because physicians documented that they could not perform the essential tasks required by those jobs, not because they were harassed out of them.

We affirm the summary dismissal of these claims.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

s/ Sweeney, C.J.
Sweeney, C.J.

WE CONCUR:

s/ Brown, J.
Brown, J.

s/ Kato, J.
Kato, J.

APPENDIX B — LETTER TO COUNSEL FROM SUPERIOR COURT JUDGE JEROME J. LEVEQUE OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THE COUNTY OF SPOKANE DATED DECEMBER 3, 2004

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THE COUNTY OF SPOKANE

Department No. 9

* * *

December 3, 2004

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LUMPER, ARLENE H VS BOEING CORP
No. 2001-02-01971-1

NOLAN, ROBIN K VS BOEING CORPORATION
No. 2001-02-05241-6

LANGAN, DENNIS L VS BOEING CORPORATION
No. 2001-02-02013-1

Appendix B

Dear Counsel:

Langan – Motion for Reconsideration

I have spent a lot of time reviewing the record regarding my previous ruling/order granting Defendant's Motion for Summary Judgment. That review included all materials originally submitted as well as those submitted specific to Plaintiff's Motion for Reconsideration.

Motion to Strike Appendix B

I am granting Defendant's Motion to Strike Appendix B. Appendix B documents are hearsay and have marginal, if any, relevance.

Plaintiff's Motion to Reconsider is denied. Neither the original record nor the positions taken regarding the Motion for Reconsideration persuaded me that my original decision was in error, factually or legally. Although there was significant time and effort, coupled with energetic argument regarding an allegation of defendant's "structured and contrived" scheme to "systematically deprive injured workers of their rights to be accommodated as required by law," I found mere conclusory allegations but could not find the necessary designated specific facts to support plaintiff's firmly held belief in that regard. (See page 3 of Plaintiff Langan's Reply re: Motion for Reconsideration.)

As pled, I believe the causes of action alleged against the defendants are claims arising out of failure to comply

with the ADA and/or the WLAD. Those claims do not include violations of the collective bargaining agreement or breach of employment contract claims or claims that Boeing did not adhere to its own policies and procedures.

I am asking that Mr. Smith prepare an order reflecting this Court's decision denying plaintiff Langan's Motion for Reconsideration. If a stipulated order is not received within the next two weeks, I will send out a notice advising the parties of the time and date for the presentment hearing. Each party will then be requested to submit their proposed order with any written briefing they feel appropriate for my consideration without oral argument.

Lumper vs. Boeing and Nolan vs. Boeing Summary Judgments

Plaintiffs and defendants have filed cross motions for summary judgment. Although there are arguments specific to each of the plaintiffs' individual claims, the key dispute primary is whether or not the defendant complied with the ADA and/or the WLAD. Plaintiffs' recent oral argument and materials in support of their motion for summary judgment significantly focused on whether Boeing complied with their own company policy regarding accommodating and/or discharging Boeing's disabled workers. That argument was that Boeing's behavior was motivated by a conspiracy to impermissibly and unlawfully weed out certain employees. The argument is that Boeing conspired to and did violate their own internal policies regarding treatment of their

employees who have physical conditions that require accommodation.

As pled, I believe the causes of action alleged against the defendants are claims arising out of failure to comply with the ADA and/or the WLAD. I have not and do not reach any decision or opinion regarding allegations that Boeing violated their internal policy regarding employee accommodations and/or whether there was a conspiracy in place to impermissibly and/or unlawfully weed out the similarly situated plaintiffs.

There was extensive briefing and exhibit submission for the parties and the Court to review and digest. After that review, it is this Court's opinion that there are no questions of fact supporting plaintiffs' contention that the defendant violated or failed to comply with the ADA or the WLAD. I do not reach any decision and do not render an opinion regarding any of the three cases that have been consolidated regarding whether or not Boeing violated their internal policy regarding employee accommodations.

Therefore, I am granting defendant's summary judgment request regarding Ms. Nolan and Ms. Lumper and denying Ms. Nolan and Ms. Lumper's motion for summary judgment.

I am asking Mr. Smith to prepare the necessary orders reflecting this Court's ruling including recitation of all materials submitted and reviewed by the Court granting defendant's motion and denying plaintiffs' motions.

Appendix B

As a post script – I reviewed the pleadings in the cases including the Second Amended Complaint, which was attached as an exhibit in Plaintiff's Motion to Amend in Nolan v. Boeing Corporation, Cause No. 2001-02-05241-6 and in Langan v. Boeing Corporation, Cause No. 01-2-02013-1 and as the Complaint which was filed in Lumper vs. Boeing Corporation, Cause No. 01-2-01971-1.

Although the Complaint appeared to have been filed as the Second Amended Complaint in each file, the factual allegations did not seem to fit. Regardless, Boeing elected to Answer the Second Amended Complaint as filed in each of the three files. My conclusion is that the causes of action as alleged are causes of action in each of the three cases that have been consolidated.

Sincerely,

s/ Jerome J. Leveque
Jerome J. Leveque
Superior Court Judge

jjl/ksm

APPENDIX C — ORDER OF THE SUPREME COURT OF WASHINGTON DATED FEBRUARY 5, 2008 DENYING PETITIONS FOR REVIEW

THE SUPREME COURT OF WASHINGTON

NO. 80036-7

ORDER

C/A NO. 23760-5-III, 23761-3-III,
24113-1-III (consolidated)

ARLENE H. LUMPER; DENNIS L. LANGAN,

Petitioners,

v.

THE BOEING CORPORATION,

Respondent.

ROBIN K. NOLAN,

Petitioner,

v.

THE BOEING CORPORATION,

Respondent.

Department I of the Court, composed of Chief Justice Alexander and Justices C. Johnson, Sanders, Owens and J. Johnson (Justice Chambers sat for Chief Justice Alexander), at its February 5, 2008, Motion Calendar, considered whether review should be granted

pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

The Petitions for Review are denied. The Respondent's motion to strike Petitioner's reply to answer and request for attorney fees is granted.

DATED at Olympia, Washington this 5th day of February, 2008.

For the Court

s/ C. Johnson
ACTING CHIEF JUSTICE

94

(2)

No. 07-1388

FILED
JUN 6 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ROBIN K. NOLAN,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Washington State Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the *non*-preemption clause of the ADA, 42 U.S.C. § 12201(b), imposes on state disability discrimination law the requirement to engage in an interactive process to accommodate a worker's disability and, if so, whether that process was satisfied by Boeing's conduct in this case.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no other parties to the proceedings other than those listed in the caption. However, two other similar actions against Respondent The Boeing Company ("Boeing"), brought by Arlene H. Lumper and Dennis L. Langan, were consolidated on appeal with the action brought by Petitioner Robin K. Nolan, and the decision of the Washington Court of Appeals that Nolan seeks the Court to review addresses and disposes of all three actions. Lumper and Langan did not join in the Petition filed by Nolan. Boeing has no parent corporations, and no publicly held company owns 10% or more of its stock, except that State Street Bank is owner of record for certain shares it holds in trust as part of Boeing's employee benefits plans.

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REGULATIONS AND RULES

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. OPINIONS BELOW

Boeing agrees with Nolan's description of the opinions below.

II. JURISDICTION

Boeing does not agree with Nolan that the Court has jurisdiction under 28 U.S.C. § 1257(a). Section 1257(a) provides that the Court may review final judgments of the highest court of a state where the validity of a federal law or treaty is drawn into question, where the validity of a state law is questioned on the grounds that it is repugnant to the federal Constitution, treaties or laws, or where a right created by federal law is asserted.

As explained more fully below, the claims Nolan has pursued in this action arise exclusively out of state law. Moreover, there is no colorable argument that the state law at issue is contrary to the federal Constitution or laws.

III. PERTINENT STATUTES AND RULES

Nolan's claims in this action are based on the Washington Law Against Discrimination, Chapter 49.60 of the Revised Code of Washington ("RCW"). RCW 49.60.180 provides: "It is an unfair practice for any employer . . . (2) To discharge or bar any person

from employment because of . . . physical disability. . . ."

IV. STATEMENT OF THE CASE

A. Factual Background

Nolan's Statement of the Case contains many inaccuracies and allegations unsupported by the record. Below is a summary of the undisputed facts, which addresses the material misstatements of fact in the Petition.

1. Nolan's Employment at Boeing

Nolan was hired by Boeing in 1991 as a manufacturing employee at its facility in Spokane, Washington, which made parts for aircraft. Nolan was hired as plastic bench mechanic, grade 3. Nolan continued working in this job classification until 1995-96, when the Spokane facility underwent a fundamental restructuring, changing from a traditional manufacturing model to a "cellular" manufacturing model. Washington Court of Appeals Clerk's Papers ("CP") 194-95. Under this new manufacturing scheme, workers were assigned to a cell, and each cell generally completed all of the tasks that were involved in producing a particular aircraft part, from start to finish. In connection with the change to cellular manufacturing, all production workers, including Nolan, were upgraded to the position of non-metallic sub-assembly technician, grade 4. CP 194-95,

App. 2a-3a. Nolan remained in this job classification until she was medically laid off.

2. Nolan's Medical Restrictions

On June 17, 1999, while working at Boeing's Spokane facility in her assigned job, Cell H, Nolan reported that she "felt a pop" in her rib cage. As a result of the injury, Nolan visited the emergency room at a local hospital, where her condition was initially diagnosed as "costo condritis." Nolan's physicians later determined that she had fractured a rib. CP 93-94, 149-50.

The day after her injury, Nolan returned to her Cell H job in a limited capacity, with a two-week set of restrictions on tasks that she was allowed to perform. In order to accommodate these restrictions, Boeing temporarily assigned Nolan to work as a "strider/monitor" in Cell H. On June 25, 1999, Boeing re-assigned Nolan to a light-duty position in the Spokane facility's maintenance department. CP 94, 134-40.

Meanwhile, Nolan sought additional treatment from Dr. Terrence Rempel, her treating physician. Dr. Rempel issued a series of temporary medical restrictions for Nolan in the following months based on her condition arising from her June 17 injury. As a result of those restrictions, Nolan was unable to return to her regular position in Cell H, and instead was assigned to a series of light-duty assignments for approximately the next four months. CP 94-97.

On October 26, 1999, approximately four months after her June 17 injury, Nolan's manager asked Nolan whether she could return to her regular position in Cell H to work in a limited capacity, cutting insulation. Nolan agreed. However, upon starting the assignment, Nolan determined that she could not perform even this limited function of her job, and complained to Boeing's Health Services Administrator, Pamela Jo Brown. App. 4a. On October 27, 1999, Boeing received a new, stricter set of medical restrictions from Dr. Rempel. As a result of those new restrictions, Nolan was returned to working light-duty in the maintenance department. CP 95-96.

3. Boeing's Efforts to Identify Reasonable Accommodations

On November 30, 1999, Boeing received new medical restrictions for Nolan from her primary treating physician, Dr. Rempel. For a period of several months following Nolan's June 1999 injury, Dr. Rempel had repeatedly provided Boeing with a succession of temporary medical restrictions for her. However, the medical restrictions issued on November 30 for Nolan by Dr. Rempel were *permanent*. Boeing immediately issued a medical recommendation for Nolan based on Dr. Rempel's new, permanent restrictions. That medical recommendation was highly limiting, stating that "Nolan may frequently lift/carry 10 lbs. and occasionally up to 25 lbs.; she cannot lift/carry over 25 lbs.; she may occasionally bend/twist; she could not work above shoulder level;

she could not work with high/low impact vibratory tools." CP 94-97, 163-64.

On December 1, 1999, Boeing's Medical Placement Review Board ("MPRB") convened in order to determine whether Boeing could reasonably accommodate Nolan in her job, given her new set of permanent medical restrictions. The MPRB is comprised of a cross-section of Boeing employees, including HR, management, and Boeing medical representatives, Equal Employment Opportunity and return-to-work specialists, and the Spokane facility's operations manager. The MPRB, in accordance with its process for evaluating whether an employee can be reasonably accommodated in his or her position, compared Nolan's medical restrictions with the job analysis for her position. The job analysis, which was prepared by a third party, described the physical requirements to perform the essential functions in the Spokane facility's various cells. If the MPRB determined that the employee could *not* perform the essential functions of his or her position with or without reasonable accommodations, its next step was to conduct a search for any other available positions in which the employee could be accommodated. CP 97-98, 245-46, 278-80.

In its December 1 meeting, the MPRB considered whether Nolan could return to her Cell H position, given her new permanent medical restrictions. Following the meeting, Brown contacted Nolan, who suggested that she might be able to work in another work group, Cell A. Based on Nolan's suggestion that

a Cell A accommodation might be an appropriate accommodation for her, Brown sent job analyses for Cell A as well as Nolan's home cell, Cell H, to Dr. Rempel so that he could assess whether having Nolan work in one of those cells would be consistent with her medical restrictions. CP 97-98, 248.

The next day, Dr. Rempel responded to Boeing's inquiry. Dr. Rempel wrote:

> Pam, I reviewed the Cell A and H JAs [job analyses]. Although Robin [Nolan] could perform the activities for Cell A, she could exacerbate her condition. It would only be a matter of time before she would have recurrent problems.

CP 333-34. Rempel also indicated that Nolan's position in Cell H was not consistent with her medical restrictions. *Id.* As Nolan acknowledges, a specialist she had consulted, Dr. Osebold, also placed permanent work restrictions on her at about this time and opined that she could not work in Cell H unless and until her medical condition improved at some unknown point in the future. Petition at 5.

On December 3, 1999, Brown, Judy Clemons (Boeing's workers' compensation administrator) and Nolan's second-level manager met with Nolan to gather information for a second upcoming MPRB meeting. At the meeting, Nolan agreed that she could not perform her Cell H position. Nolan also asked to have her treating physician, Dr. Rempel, visit the Spokane facility so that he could assess whether she

could work in Cell A or H. Brown explained to Nolan that this was an unusual request, but stated that she would ask Dr. Rempel if he could visit the facility. Accordingly, Brown contacted Dr. Rempel. Dr. Rempel indicated that he could visit the facility on January 6, 2000. Nolan was also placed on a medical leave of absence at the end of the meeting, and was informed that another MPRB meeting would be held to review her situation. CP 98-99, 172, 174-76.

The MPRB met again on December 14, 1999, to revisit whether Nolan could be accommodated in her Cell H position or, if not, whether she could be reasonably accommodated in another available position. The MPRB determined that Nolan's multiple, permanent medical restrictions simply could not be reconciled with the wide variety of physically demanding tasks in the Cell H job, which included lifting or carrying up to 25 lbs., frequent bending and twisting, use of high and low impact vibratory tools, and frequent reaching. The MPRB noted that the lifting/carrying requirement might be reasonably accommodated, but that the other requirements clearly could not. The MPRB also considered whether other available, vacant positions existed in which Nolan might be reasonably accommodated, and circulated Team Route Slips to managers throughout the plant to assess whether there were appropriate, available openings for Nolan. However, this survey revealed that there were *no* openings in any area of the plant. CP 99, 178, 198-99, 203, 352, 362. (There is utterly no support in the record, and it defies common

sense, that in a plant of well *under* 1000 total employees, there were 290 open (high-paying, union) positions during this time period, as Nolan claims in her Petition.)

The MPRB was charged with considering – and did consider – whether Nolan's disability could be accommodated. At no time was Nolan, her doctors, or Boeing able to identify any accommodation that would have made it medically possible for Nolan to perform her job in Cell H. (Even during the years of litigation that have ensued, no such accommodation has ever been identified by Nolan and her legal team. Nolan's current argument, that she should have been allowed an even longer medical leave of absence to allow time for her injuries to heal, is contrary to her own doctor's judgment that her medical restrictions were permanent.) At no time did Boeing ever tell Nolan that it "did not want to accommodate her disability," or refuse to consider accommodations, as Nolan now argues.

On January 6, 2000, Dr. Rempel personally visited the Spokane facility. Based on his observations of the work performed at the Spokane facility, Dr. Rempel noted that in Nolan's Cell H job, "there is a significant amount of grasping, pushing, and pulling, including with force" required. He also observed that Cell A involved a "significant amount of reaching and grasping," and said nothing to contradict his earlier determination that Nolan, in light of her permanent medical restrictions, was simply not able

to perform the essential functions of her position. CP 180.

4. Nolan's Medical Layoff and Subsequent Events

As Nolan herself acknowledges, the MPRB met on multiple occasions on Nolan's case. Boeing had numerous interactions with Nolan and her doctor. However, in the final analysis, Nolan's treating physician determined that she was not medically able to perform her existing job, no accommodation could be identified, and no open positions were available. Thus, Nolan was issued a medical layoff on January 11, 2000.[1] CP 182.

Nolan received workers' compensation benefits for nearly a year-long period leading up to, and following, her medical layoff. Nolan received temporary total disability benefits from December 1999 through November 2000, nearly a year after her medical layoff. Nolan received these benefits in

---

[1] Nolan's argument (Petition at 8) that a 1998 email allegedly shows that Boeing had a scheme to reduce the number of injured workers must be addressed. First, the email at issue has never been authenticated by testimony or affidavit. It was simply stapled to one of Nolan's briefs. CP 712-13. Second, there is no evidence that the email or its supposed author had any connection to Nolan's medical layoff. CP 805. Third, even if authentic, the email never uses the word "baggage" and seems to be an innocuous exhortation to reduce on-the-job injuries.

addition to other medical and rehabilitative benefits. CP 281-328.

Nolan also underwent a Physical Capacities Evaluation ("PCE") on March 20, 2000, approximately three months after her medical layoff, in order to assess her employability. That PCE confirmed yet again that Nolan probably would never be able to regain the physical abilities to return to her position at Boeing, due to her continued symptoms and inability to reach forward and upward with her right upper extremity. CP 336-46.

B. Procedural Background

Nolan, Lumper, and Langan filed actions against Boeing in Spokane County (Washington) Superior Court, alleging disability discrimination under the Washington Law Against Discrimination, Chapter 49.60 RCW ("WLAD"). Boeing removed the cases to the United States District Court for the Eastern District of Washington, and then moved for summary judgment dismissal, on the basis that the claims were preempted by Section 301 of the National Labor Relations Act. The trial court ruled that the claims were preempted, but the Ninth Circuit Court of Appeals reversed. The Ninth Circuit concluded that the scope of Section 301 preemption was narrower than the trial court had determined, and ordered that the three actions be remanded to state court. *Lumper v. Boeing Corp.*, 2003 WL 22301793, at **1-2 (9th Cir. Oct. 7, 2003).

After the cases were remanded to Spokane County Superior Court, Boeing moved for summary judgment dismissal of Nolan's disability discrimination claims as a matter of law. The trial court granted Boeing's motion for summary judgment, dismissing Nolan's claims in their entirety and with prejudice. (Separately, Boeing moved for summary judgment dismissal of Lumper's and Langan's actions, and the motions were granted.)

Nolan, Lumper, and Langan then appealed their cases to the Washington Court of Appeals, Division III, where the appeals were consolidated. The court of appeals affirmed, ruling that the trial court had correctly decided that each of the claims in the three actions failed as a matter of law. Nolan, Lumper, and Langan then sought discretionary review by the Washington Supreme Court. On February 5, 2008, the Washington Supreme Court denied their petitions for review. App. 27a-28a.

V. REASONS FOR DENYING THE PETITION

A. Summary of Reasons

Nolan desperately tries to create a federal law issue in this case but it cannot be done. This is a routine employment discrimination action brought exclusively under state anti-discrimination law, like countless others brought every day in state courts across the country. Nolan seeks review by the Court based on a supposed split between the unreported intermediate *state* appellate court decision in her case

and a decision of the Ninth Circuit that was *vacated* by the Court. Assuming, arguendo, that such a split exists (and one does not), it plainly cannot be the basis for the Court to grant review. The decisions below were correct, fact-specific, and unpublished. No issue of federal law is presented and notably, the Petition violates this Court's Rule 14(g)(i) in that it seeks review of a state court judgment, but fails to identify "when the federal question[ ] sought to be reviewed w[as] raised; the method or manner of raising [it] and the way in which [it was] passed on by those courts." This case is unworthy of review by the Court.

B. No Issue of Federal Law Is Presented in This State Law Case

Nolan had a choice when she commenced this action: she could have pleaded a cause of action under the ADA, a cause of action under the Washington Law Against Discrimination or both. For whatever strategic or tactical reasons (e.g., avoiding federal court), Nolan chose to plead her cause of action under the WLAD and to plead no ADA or other federal law claim. Nolan has never pleaded a cause of action based on federal law.

Boeing initially removed the case to federal district court, arguing that Nolan's state law claim for disability discrimination was preempted by Section 301 of the National Labor Relations Act, 29 U.S.C. § 185, because the disability discrimination claim

could not be resolved without the court interpreting certain provisions of the union contract that governed the terms and conditions of Nolan's employment relationship with Boeing. The federal district court agreed with Boeing's argument and dismissed Nolan's action as preempted. The Ninth Circuit reversed and remanded to state court, based in part on an intervening decision of that court clarifying (and limiting) the scope of Section 301 preemption of a statutory claim. Throughout those proceedings in federal court, Nolan disclaimed any federal law cause of action and consistently argued against any federal jurisdiction.

Upon remand to Spokane County Superior Court, the claims in this action have been decided on entirely state law grounds. It is thus stunning that Nolan is now arguing that her disability discrimination claim is (or should be) based on federal law, or that this action presents a substantial question of federal law. In any event, her arguments do not withstand scrutiny, as explained below.

C. 42 U.S.C. § 12201(b) Does Not Preempt State Laws or Require that the ADA Be Incorporated into State Law

Nolan's main argument that a federal law issue is presented here is that 42 U.S.C. § 12201(b), a section of the ADA, requires that when, as here, a state court is applying a state anti-discrimination law, the state court must incorporate provisions of the ADA into the state law, whenever the ADA provides

more protection to the plaintiff than state law. This argument is refuted by the plain language of the ADA and the dearth of any case law supporting Nolan's reading.

Section 12201(b) provides:

> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.

42 U.S.C. § 12201(b). The statute, then, is a *non*-preemption provision. The statute provides that the ADA does *not* preempt state laws that provide greater or equal protections to the rights of disabled than the ADA. It evinces a congressional intent to *not* completely occupy the field of discrimination against the disabled.

Nolan turns Section 12201(b) on its head by arguing it is a preemption provision. Nolan argues that Section 12201(b) means that if a provision of state law provides less protection than the ADA, then the state law is preempted by – and replaced with – the ADA provision. However, there is plainly no such language in the statute.

Not surprisingly, there is no case authority to support this extremely strained reading of Section 12201(b). Nolan cites one trial court case, *American Association of People with Disabilities v. Hood*, 278 F. Supp. 2d 1345 (M.D. Fla. 2003), for the proposition

that state law "must give way to the ADA," Petition at 11, but the case is inapposite and does not stand for that proposition. *Hood* is a case filed in federal court and brought under the ADA, *not* state law. The *Hood* plaintiffs alleged that individuals with disabilities did not have adequate access to voting machines. 278 F. Supp. 2d at 1350-51. One defense raised by the defendants was that they had complied with other federal and state laws specifying certain aspects of voting machine access. *Id.* at 1355-56. The district court rejected that defense. *Id.* at 1356. The district court in *Hood* mentions that Section 12201(b) of the ADA provides that the ADA shall not be construed to invalidate any federal or state law offering greater protection to the rights of individuals with disabilities than under the ADA, *id.*, but that is far from ruling that state or local laws offering lesser protection are preempted by the ADA. In any event, *Hood* did not involve a claim under a state anti-discrimination law, so it cannot stand for the proposition suggested in the Petition that when a plaintiff brings a claim under state anti-discrimination laws, certain provisions of the ADA must be imported into that claim.

D. Boeing Engaged in an Interactive Process with Nolan

Even if Nolan had pursued a federal ADA claim and even if the ADA preempted the Washington Law Against Disabilities, there is no reason for the Court to grant review because Boeing engaged in the very interactive process that Nolan argues is required by

the ADA and only "recommended" under the WLAD. Based mainly on the vacated decision in *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), *vacated*, 535 U.S. 391 (2002), Nolan argues that the ADA requires that an employer engage in the interactive process with any employee whose disability prevents her from doing her job, no matter what the surrounding facts are. Nolan argues that this interactive process is not required under the Washington Law Against Discrimination and is hence an instance where the WLAD offers less protection than the ADA. Thus, Nolan argues, the state court applying the WLAD here should have incorporated the ADA's allegedly categorical requirement for engaging in the interactive process.

Setting aside the legal infirmities discussed above, Nolan's facts make this case unworthy of the Court's review as to whether the interactive process is required under both the ADA and the WLAD. In this case, it is indisputable that Boeing repeatedly conferred with Nolan and her treating physician in the weeks and months leading up to her medical layoff. Boeing undeniably engaged in an interactive process with Nolan, as explained in the court of appeals' decision. App. 4a, 5a, 14a.

Even if Section 12201(b) could be converted from a non-preemption provision to a preemption provision, requiring the state court to adopt any ADA requirements for the interactive process, it would not have changed the result here. In sum, Nolan cannot

prevail even under the legal proposition she has asserted.

E. No Clear Circuit Split Exists Concerning the Interactive Process Under the ADA

Perhaps recognizing that a supposed conflict between an unreported intermediate state court of appeals decision and a Ninth Circuit decision is not certworthy, Nolan uses much of the Petition to argue that the vacated decision of the Ninth Circuit in *Barnett* is in conflict with decisions of other circuits. Nolan argues that the Court "should grant review to resolve the split in the Circuits as to the necessity of a mandatory interactive process between an employer and disabled worker." Petition at 21. Even if this state court case were the proper vehicle to resolve such a federal circuit split (which it is not), the Tenth and Eleventh Circuit cases cited by Nolan do not present a square conflict with the Ninth Circuit's decision in *Barnett*.

In *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (per curiam), the Eleventh Circuit "assum[ed]" that "an employer has an affirmative obligation . . . to engage in the interactive process." It did not reject *Barnett*'s decision that this process was required, but ruled that *if no reasonable accommodation was available*, an employer could not be held liable merely for not engaging in the interactive process. The Ninth Circuit recognized this same principle in *Barnett*: "We hold that employers, who

fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible." 228 F.3d at 1116. In *White v. York International Corp.*, 45 F.3d 357, 363 (10th Cir. 1994), the Tenth Circuit affirmed a summary judgment for the employer on the unremarkable basis that the plaintiff "produced no evidence that accommodation was possible." The Tenth Circuit also observed in passing that the EEOC regulations regarding the interactive process are merely a "*recommendation* [not] a statutory *requirement*," *id.*, but the alleged conflict between dictum in this 13-year-old case in which the losing party did not seek review from the Court and a decision vacated by the Court six years ago does not present the Court with any square conflict warranting this Court's attention at this time.

F. The Decision of the Washington Court of Appeals Is Correct on the Undisputed Facts of This Case

Finally, the Petition should be denied because the state court of appeals correctly decided the questions of Washington state law presented to it. The court held that summary judgment in favor of Boeing was proper because Nolan simply failed to come forward with evidence of essential elements of her claims.

Nolan's central legal claim was that Boeing failed to reasonably accommodate her disabilities. As the Court of Appeals correctly stated, under Washington

law, in a failure to accommodate claim, the plaintiff bears the initial burden of stating a prima facie case. App. 8a. In order to state a prima facie case, the plaintiff must show that (1) he or she had a sensory, mental or physical abnormality that substantially limited his or her ability to perform the job; (2) he or she was, nonetheless, qualified to do the essential functions of the job; (3) he or she gave the employer notice of the abnormality; and (4) the employer failed to affirmatively adopt available measures to accommodate the abnormality. *Id.* (citing *Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 138-39, 64 P.3d 691 (2003)).

As the trial court and appellate court recognized, Nolan's failure to accommodate claim failed as a matter of law because she could not show that she could perform the essential functions of her manufacturing job, with or without reasonable accommodations. As the appellate court explained, Nolan's "physician said she could not do any of the work without risk of serious injury" and that she "could perform none of the production tasks, by [her] own evidence." App. 14a. The undisputed evidence also showed that neither Nolan nor Boeing was "able to suggest any way to modify the job to enable [her] to continue in these production cells." *Id.* As an alternative to showing she could do the essential functions, Nolan could have tried to show she was qualified to fill a vacant position, but as the appellate court concluded, Nolan "did not produce specific evidence of any particular vacant positions, claim that [she]

applied for them, or claim [she was] denied an available position because of [her] disability." App. 15a. Nolan is simply unhappy with the state appellate court's reading of the summary judgment record.

In summary, the Washington Court of Appeals' unpublished opinion affirming dismissal of the Nolan's claims amounts to nothing more than a standard and unremarkable application of the law in Washington on reasonable accommodation claims to the particular undisputed facts of her case. There is no error in the Court of Appeals' decision and certainly not one worthy of the Court's review.

VI. CONCLUSION

Nolan's petition for writ of certiorari should be denied.

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June 6, 2008

FILED
JUN 17 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1388

IN THE
Supreme Court of the United States

ROBIN K. NOLAN,

Petitioner,

v.

THE BOEING CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

REPLY BRIEF

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REASONS FOR GRANTING THE PETITION

A. Summary of Reasons

It is well-established by this Court that preemption of a state law by a federal statute can be implied as well as express. Boeing asserts that although the Washington Law Against Discrimination (WLAD) provides less protection to disabled workers than the Americans with Disabilities Act (ADA), it is not preempted because Congress did not expressly prohibit such laws. This novel argument utterly ignores this Court's Supremacy Clause jurisprudence, and frustrates Congress' purpose in enacting the ADA.

The WLAD falls below the minimum floor of protection established by the ADA. It is thus impliedly preempted under the Supremacy Clause because it frustrates the goals and objectives of Congress in eliminating discrimination against disabled persons.

B. This Court's Well-Established Precedent Contradicts Boeing's Novel Assertion that Preemption Can Only Be Express, Never Implied

Boeing notes in its brief in opposition that 42 U.S.C. § 12201(b) leaves in place those laws that provide "greater or equal protection for the rights of individuals with disabilities," opposition brief at 14, however, Boeing argues that federal statutes can only be interpreted to preempt state laws when Congress so provides, with "language in the statute." *Id.* This is a novel argument that must be addressed on reply.

The central question of Nolan's petition – which Boeing fails to address – is this: What effect does the ADA have on state laws, like the WLAD, that provide *lesser* protection for disabled persons? Congress drafted the ADA so as *not* to invalidate state disability laws, but *only* to the extent that those laws provide *greater or equal* protection than the ADA. Therefore, logic, precedent, and simple principles of statutory construction suggest that the ADA *does* invalidate laws providing lesser protection. It is this implied preemption that Nolan invokes in this case.

Express preemption is only one of many methods by which state laws can be preempted. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712-13, 105 S. Ct. 2371, 85 L.Ed.2d 714 (1985). It is well-established that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to," federal law. *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 6 L.Ed. 23 (1824). In the absence of express preemptive language, Congress' intent to preempt all state law in a particular area can be inferred if Congress "left no room" for supplementary state regulation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Preemption of a whole field also will be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Ibid.; *see Hines v. Davidowitz*, 312 U.S. 52, 61 S. Ct. 399, 85 L.Ed. 581 (1941).

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified

to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217-18, 10 L.Ed.2d 248 (1963). *See generally, Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-699, 104 S. Ct. 2694, 2700, 81 L.Ed.2d 580 (1984).

Also, if a state law conflicts with a federal law and "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," the conflicting state law is preempted and/or invalidated. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615 (1984); *Hines v. Davidowitz*, 312 U.S. at 67. Even if the federal law does not expressly preempt conflicting state laws, this Court has found implied preemption when the state law frustrates the purpose of the federal law.

C. The ADA Impliedly Preempts the WLAD, Which Allows Employers to Fire Disabled Workers Without Engaging in the ADA-Mandated Interactive Process

Congress has identified the interactive process as "the primary means by which employees disabuse employers of their notions about the skills and abilities of employees with physical and mental impairments." H.R. Rep. No. 101-485, pt. 2 at 65 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 347. A disability discrimination statute that does not provide this protection represents a significant barrier to a person's right to equal employment opportunities. *Id.* Also, under the ADA, the interactive process must take place *before* any argument

can be made that the worker must demonstrate she can perform the essential functions of the job or that there is a precise accommodation available for the worker's disability. *Id.*

The WLAD, both facially and as applied by the Washington Court of Appeals in this case, provides less protection to disabled workers than the ADA, because it does not require that employers engage in an interactive process to reasonably accommodate disabilities. The Washington Court of Appeals concluded that the WLAD did not require an interactive process. The Court of Appeals also held that "the question of reasonable accommodation does not arise until the [disabled workers] show that they can do the essential functions of the job." *Lumper*, 2006 WL 3691663 at *7. *See also, Davis v. Microsoft Corp.*, 70 P.3d 126, 131-34 (Wash. 2003).

This Court should grant review and definitively resolve whether the ADA impliedly preempts state laws that provide less protection for disabled workers.

D. Boeing Improperly Asserts that It Engaged in an Interactive Process with Nolan; the Court of Appeals' Opinion Suggests Otherwise

Boeing contends that, despite denying that any such process was required by law, it nonetheless actually engaged in an interactive process with Nolan to accommodate her disability. Opposition brief at 15-17.

This contention has *no basis* in the opinion of the Washington Court of Appeals. A careful review of that

opinion reveals no factual background, nor any legal analysis, of whether Boeing engaged in an interactive process. *Lumper*, 2006 WL 3691663. Under the Court's factual recitation of Nolan's case, there is no mention of any process in which Boeing engaged Nolan. *Id.* at *1-2. Also, the Court of Appeals dismissed as legally inadequate Nolan's assertion that the interactive process is mandatory, without commenting on whether Boeing met this standard. *Id.* at *4-5.

In this case, Boeing violated the ADA in its application. The ADA requires Boeing to engage in a good faith interactive process, which would have identified Nolan's precise limitations, the essential functions of any job in question, and the barriers to Nolan performing the essential functions of such jobs. Only from this interactive process could Nolan and Boeing identify a reasonable accommodation, which would include any suggestion of modification if needed to allow her to perform the essential functions of the job in question. Boeing violated Washington law, insofar as that lesser law is preempted by ADA.

CONCLUSION

The decision of the Washington courts here strike at the heart of a central feature of the ADA – employers must undertake a reasonable accommodation of a disabled worker's disability by engaging in a mandatory interactive process with the worker on accommodation of the worker's disability. This process is designed to have employers and disabled workers work together to identify the essential functions of the worker's job, the worker's disability, and the available options to accommodate the worker to effectuate the goal of maintaining the disabled worker in gainful employment.

To the extent Washington state anti-discrimination law fails to provide for such a mandatory interactive process on reasonable accommodation of a worker's disability, or Washington law conditions a disabled worker's participation in such a mandatory process by requiring her to prove she can perform the allegedly "essential functions" of the job, it provides lesser protection to disabled persons and is preempted under 42 U.S.C. § 12201(b) in favor of the better protection of disabled persons found in the ADA.

This Court should accept review.

Respectfully submitted,

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